

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No. 1136 of 2016

Arising Out of PS. Case No.-15 Year-2007 Thana- ADAPUR District- East Champaran

1. Ram Sevak Sah, Son of Late Yado Lal Sah
2. Sanjay Sah, Son of Panna Lal Sah
3. Awadhesh Sah, son of Jawahir Sah
4. Ashok Sah, Son of Jawahir Sah
5. Madan Sah, Son of Late Vishun Sah
6. Srilal Sah, Son of Vishwanath Sah

All the Above are Residents of Village-Harpur, Police Station-Harpur,
District-East Champaran

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance:

| | | |
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| For the Appellant/s | : | Mr. Bindhyachal Singh, Sr. Adv. Mr. Bipin Kumar Singh, Adv. |
| For the State | : | Mr. Dilip Kumar Sinha, Adv. |
| For the Informant | : | Mr. Uma Shankar Verma, Adv. Mr. B.K. Mishra, Adv. |

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

and

HONOURABLE MR. JUSTICE NANI TAGIA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date: 06-03-2025

The present appeal under Section 374 (2) and Section 389
(1) of the Code of Criminal Procedure, 1973 (hereinafter
referred to as “the Cr.P.C.”) has been preferred against the



judgment of conviction and order of sentence dated 27.08.2016 and 02.09.2016 respectively, passed in Sessions Trial No. 403 of 2009 (arising out of Adapur P.S. case No. 15 of 2007) by the learned VIIIth Additional Sessions Judge, East Champaran at Motihari (hereinafter referred to as “the learned Trial Judge”). By the said judgment, the learned Trial Judge has convicted all the appellants under Section 147 and 149/302 of the Indian Penal Code (hereinafter referred to as “the IPC”) and has sentenced them to undergo two years imprisonment under Section 147 of the IPC and life imprisonment under Section 149/302 of the IPC with fine of Rs. 10,000/- each and in default thereof, the appellants have been directed to undergo additional six months rigorous imprisonment. Both the sentences have been ordered to run concurrently.

2. Short facts of the case are that on 24.01.2007, a written report was submitted by Suresh Prasad (the informant) before the Officer-in-Charge, Police Station-Harpur (Adapur, East Champaran), wherein he has stated that he is resident of Harpur and on 24.01.2007 at about 06:30 am in the morning, his elder brother, Shiv Nath Prasad, was coming after easing himself and when he had reached at the door of the house of Ram Darshan, Laxman Sah, Awadhesh Sah (Appellant No. 3), Mahanth Sah,



Vijay Sah, Ajay Sah, Ram Ekbal Sah, Sanjay Sah (Appellant No. 2), Inar Sah and Ram Sewak Sah (Appellant No.1) had surrounded him, who were sitting there from before. Thereafter, these accused persons had caught hold of the elder brother of Suresh Prasad (informant), namely, Shiv Nath Prasad and had started assaulting him as also abusing him. In the meantime, Laxman Sah had given a *lathi* blow on the forehead of Shiv Nath Prasad, resulting in his elder brother becoming injured and falling on the ground. Thereafter, the rest of the accused persons had also assaulted him with *lathi* and *fatha*, leading to his elder brother becoming unconscious. The witness to the occurrence, namely, Ram Darshan Sah, Santosh Prasad, Vinod Sah, Manoj Prasad and Ram Ekbal Prasad had intervened leading to his life being spared. During the course of intervention, Awadhesh Sah (Appellant No. 3) had given a *lathi* blow on the right hand of Ram Darshan Sah leading to his right hand being fractured. Then Mahanth Sah had taken out a sum of Rs. 600/- from the pocket of the elder brother of Suresh Prasad (informant), which he had earned upon selling vegetables. The informant, namely, Suresh Prasad, has further stated that on the previous day i.e. on 23.01.2007 in the night, the accused persons, without any reason, had assaulted Shambhu Sah and Biru Kumar badly and



injured them, whereafter he had given information about the same to the Officer-in-Charge and then the Office-in-Charge had arrived in the night and seen the injured. It has been stated that on account of the said reason, today's occurrence has taken place and the condition of his elder brother Shiv Nath Prasad is critical, hence, the Doctor at Duncan Hospital, Raxaul, had referred him to PMCH, Patna, for further treatment. He has also stated that his elder brother Shiv Nath Prasad was admitted at Duncan Hospital, Raxaul, in an unconscious state.

3. After the aforesaid written report dated 24.01.2007 was submitted by Suresh Prasad, a formal FIR bearing Adapur (Harpur) P.S. case No. 15 of 2007 was registered for the offences under Sections 147/148/149/341/323/325/307/379/504 of the IPC on 25.01.2007 at about 12:30 hours. Since Shiv Nath Prasad had died, Section 302 of the IPC was added, vide order dated 06.02.2007. After investigation and finding the case to be true qua the appellants and others, the police had submitted charge-sheet under Sections 147,148,149,323, 325, 341 and 302 of the IPC on 28.1.2008 against Ram Sevak Sah as also against Sri Lal Sah, Madan Sah and Ashok Sah while showing them to be absconders. In fact, final form was filed qua the Appellant No. 3, Awadhesh Sah and Appellant No. 2, Sanjay Sah as they



were not found guilty. Nonetheless, the learned Trial Court had taken cognizance of the offences under Sections 147,148,149, 341, 323, 325 and 302 of the IPC against the appellants by an order dated 10.03.2008. Thereafter, the case was committed to the Court of Sessions and was numbered as Sessions Trial No. 403 of 2009. After taking into consideration the charge-sheet and the materials collected during the course of investigation, the learned Trial Judge had framed charges under Sections 147 and 302/149 of the IPC against the Appellants, vide order dated 28.10.2009, to which they pleaded not guilty and claimed to be tried.

4. During the course of trial, nine witnesses have been examined. While P.W.1 Baijnath Prasad is the cousin of the deceased, P.W. 3 Kisnawati Devi is the wife of the deceased and P.W.6 Suresh Prasad is the informant of the present case as also the brother of the deceased. P.W.2 Shravan Sah is the cousin brother of the deceased. P.W.7 Ganesh Ram is the Investigating Officer. P.W.9 Dr. Arun Kumar Singh is the Doctor who had conducted postmortem of the body of the deceased and P.W.10 Dr. S. K. Paswan is the Doctor who had examined the injured. As far as P.W.4 Ram Darshan Sah (injured) and P.W.5 Mahendra Sah are concerned, they are independent witnesses. P.W.8



Hardyal Sah has been declared hostile. P.W.11 is an Advocate Clerk, who has proved the FIR and the inquest report. The defense had also examined four witnesses.

5. Sri Bindhyachal Singh, the learned Senior Counsel for the appellants, assisted by Sri Bipin Kumar Singh, Advocate, has submitted that the written report dated 24.01.2007, leading to lodging of the FIR on 25.01.2007 is not the earliest version. It is stated that the written report dated 24.01.2007 has been signed by Suresh Prasad i.e. the informant, but the same is admittedly not in his writing and during the course of his evidence, P.W.6 Suresh Prasad has admitted that the same was scribed by Meghnath Prasad, however, he has not been examined by the prosecution in the present case. It is also stated that the written report dated 24.01.2007 does not even contain any recital to the effect that the FIR was read over to the informant who had understood the same and had then put his signature after finding the same to be correct. It is also stated that P.W.6 Suresh Prasad (informant) has stated in his evidence that he had filed case against 17 persons, however, the FIR dated 25.01.2007 is against 9 persons only. Thus, it is submitted that the initial version has been suppressed. It is also stated that P.W.7 i.e. the Investigating Officer of this case has stated in his evidence that



he had recorded the statement of Ram Darshan Sah at 11:15 pm on 24.01.2007 itself, thus the same being the first version should have formed the basis of registration of the FIR in question, however, the said statement of Ram Darshan Sah has not been exhibited by the prosecution, which also creates doubt about the case of the prosecution. It is next contended that there has been delay in lodging the FIR for which there is no plausible explanation, hence the case as propounded by the prosecution is concocted. In this regard, it is stated that though the occurrence had taken place on 24.01.2007 at about 06:30 am in the morning and the written report was also submitted before the Officer-in-Charge, Harpur (Adapur) Police Station, on 24.01.2007 itself, nonetheless, the FIR was registered only on 25.01.2007 at about 12:30 hours and in fact, Ganesh Ram (Investigating Officer) has stated in his evidence that though he had started investigation on 24.01.2007 itself and had forwarded the written report to the Officer-in-charge, Police Station Adapur for instituting FIR, nonetheless, it appears that the said forwarding note has been appended subsequently in order to cover the delay and in fact, the FIR was registered on the next day i.e. on 25.01.2007 and was received in the Court belatedly on 27.01.2007. Thus, it is submitted that apparently the earliest version of the incident in



question has been withheld and a concocted version of the incident has been brought on record for the purposes of registration of FIR. The learned Senior Counsel for the appellants has further submitted that the witnesses who have been examined by the prosecution are though stated to be eye-witnesses but it is not a fact that they are eye-witnesses, inasmuch as they had arrived at the place of occurrence much after the occurrence had taken place. In this connection, it is submitted that as far as P.W.2 Shravan Sah is concerned, he has stated in his evidence that at the time when Suresh Sah had filed the case he was outside and had returned home in the evening. Thus, it is submitted that P.W.2 is admittedly not an eye-witness. Similarly, it is stated that as far as P.W.3 (Kisnawati Devi) is concerned, she has stated in her evidence that after she raised *hullah*, Suresh (P.W.6), Shravan (P.W.2), Baijnath (P.W.1), Santosh, etc. and had arrived there. Hence, it is submitted that admittedly P.W.1, P.W.2 and (P.W.6) had arrived at the place of occurrence after the occurrence had already taken place, thus they cannot be stated to be eye-witnesses. P.W.3 (Kisnawati Devi) has also stated in her evidence that when she reached the place of occurrence and saw her husband, he was conscious but he did not tell her as to who had assaulted him, meaning thereby



that she was also not present at the time her husband had been assaulted, thus she cannot also be an eye-witness. P.W.4, Ram Darshan Sah has stated in his evidence that after he heard hulla (alarm) he came out of his house after 10 minutes and went to the place of occurrence where Shivnath Sah was lying on the ground and he became unconscious after 10 minutes but he did not talk to him. P.W.5, Mahendar Sah has stated in his evidence that after he heard hulla (alarm) he went to the door of the house of Ram Darshan Sah where many people had assembled and he saw that Shivnath Sah was lying on the ground. Thus, it is submitted that even P.W.5 cannot be stated to be an eye-witness. In nutshell, the argument of the learned Senior Counsel for the appellants is that all the aforesaid witnesses are hearsay witnesses and not eye-witnesses as is apparent from the evidence led by the prosecution.

6. The learned Senior Counsel for the appellants has next contended that it is surprising that though the place of occurrence is at the middle of the village in question, still the prosecution has examined only interested witnesses and not independent witnesses, which further creates a doubt about the case of the prosecution. It is submitted that most of the witnesses have been examined by the Police after lapse of



considerable time of the occurrence which also leads to the inference that the correct version has not come on record. The learned Senior Counsel for the appellants has further submitted that it has come in the evidence of the prosecution that at the place of occurrence, there were 24-25 persons, however none of the independent witnesses have been examined. It is also contended that the prosecution story does not corroborate with the medical evidence. The learned Senior Counsel for the appellants has referred to the evidence of P.W.9 Dr. Arun Kumar Singh to submit that no external injury of *lathi* blow has been found on the head of the deceased, thus the manner of occurrence is belied. It is also stated that P.W.10 Dr. S. K. Paswan has stated that the injuries are within 24 hours, however, the fact is that the injury was stated to have been inflicted upon Ram Darsan Sah on 24.01.2007 at about 6:30 am, whereas Dr. S. K. Paswan had examined the injured person, namely, Ram Darsan Sah, on 25.01.2007 at 1:45 pm, hence the manner of occurrence is not proved. In this connection, the learned Senior Counsel for the appellants has referred to Section 45 of the Indian Evidence Act and has also referred to a judgment, rendered by the Hon'ble Apex Court, reported in AIR 1960 SC 706 (*Smt. Nagindra Bala Mitra and Anr. vs. Sunil Chandra*



Roy and Anr.) to submit that value of a medical witness is not merely a check upon the testimony of eye-witnesses but it is also an independent testimony because it may establish certain facts, quite apart from the other oral evidence. The learned Senior Counsel for the appellants has also submitted that motive of the occurrence has not been proved. Thus, in nutshell the evidence of the prosecution witnesses would show that none of the witnesses are eye-witnesses, hence their evidence cannot be said to be credible or trustworthy, thus the conviction of the appellants is perverse. Lastly, it is submitted that even if all the evidences adduced by the prosecution are accepted to be true on their face value, it would be apparent that though there is one injury but 12 accused persons have been convicted and moreover, the Appellants herein have not been alleged to have engaged in any specific overtact apart from the fact that the allegations qua them does not stand substantiated by the medical evidence, hence the judgment and order of conviction and sentence is fit to be set aside.

7. *Per contra*, the learned APP for the State, Sri Dilip Kumar Sinha, has submitted that one co-convict namely Laxman Sah had given a *lathi* blow on the head of the deceased and the evidence of the Doctor, who has conducted postmortem,



i.e. P.W.9 would show that the cause of death is head injury, hence the offence committed by the co-convict Laxman Sah stands corroborated by the evidence on record and moreover, the appellants herein being member of unlawful assembly are guilty of the offence committed in prosecution of that object. It is further submitted that as far as lodging of F.I.R. on the basis of written report dated 24.01.2007 is concerned, there is no lacuna inasmuch as after the Police received the written report dated 24.01.2007, the same was forwarded to the Office-in-Charge, Harpur (Adapur) Police Station, whereupon the F.I.R. was registered on 25.01.2007 at 12:30 hours. It is also submitted that the present case arises out of case and counter case. It is contended that the evidence of relatives and family members cannot be discarded, however the same is required to be carefully scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict / accused in a given case. Thus, it is submitted that the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased and in case, the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can and certainly should be relied upon. Reference, in this connection has been made by the learned APP for the State on a judgment,



rendered by the Hon'ble Apex Court in the case of *Yogesh Singh vs. Mahabeer Singh and Others*, reported in (2017) 11 SCC 195. It is next contended by the learned APP for the State that in the present case, the evidence of prosecution witnesses are credible and trustworthy, hence, fit to be relied upon for the purposes of upholding the conviction of the appellants. It is also submitted that in case, direct evidence is available, motive does not play much role. In this connection, reliance has been placed on a judgment, rendered by the Hon'ble Apex Court in the case of *Shivaji Chintappa Patil v. State of Maharashtra*, reported in (2021) 5 SCC 626. It is also stated that all the witnesses are eye-witnesses and it is wrong to say that they are not eye-witnesses, as would be apparent from their evidence on record. It is also stated that there is no material contradiction in the evidence led by the prosecution and the evidence of the prosecution witnesses are consistent and cogent. As far as the Appellants are concerned, they are members of unlawful assembly, hence they have been convicted under Section 302 of the I.P.C. with the aid of Section 149 of the IPC. Thus, it is submitted by the learned APP for the State that there being no contradictions in the evidence of the prosecution witnesses, who are consistent in their testimony, no interference is required in the judgment of



conviction and the order of sentence, rendered by the learned Trial Judge, hence the appeal is fit to be dismissed.

8. Besides hearing the learned counsel for the parties, we have minutely perused both the evidence i.e. oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

9. P.W.1 Baijnath Sah is cousin brother of the deceased and he has stated in his deposition that the occurrence dates back to 10-11 months at about 6:00 am in the morning when he was going for easing himself and when he had reached near the house of Ram Darshan Sah (P.W.4) then he saw that Shiv Nath Sah has been surrounded by many people, namely, Laxman Sah, Sri Lal Sah (Appellant No. 6), Om Prakash Sah, Mahanth Sah, Vijay Sah, Ajay Sah, Ashok Sah (Appellant No. 4), Awadhesh Sah (Appellant No. 3), Jawahir Sah, Ram Sevak Sah (Appellant No. 1), Ramekbal Sah, Madan Sah (Appellant No. 5), Ambika Sah, Panna Lal Sah, Inar Sah, Sanjay Sah (Appellant No. 2) and Mahavir Yadav. Thereafter, Mahanth Sah and Awadhesh Sah (Appellant No. 3) had ordered to kill Shiv Nath, whereupon Laxman Sah had assaulted the deceased by *lathi* on his head, whereafter Shiv Nath Sah had fallen down and then all the accused persons had assaulted him by *lathi*. Ram Darshan Sah



(P.W.4) had then gone to save the deceased, however he was assaulted by *lathi* on his right hand. The occurrence was seen by Ram Darshan Sah (P.W.4), Manoj Sah, Haridyal Sah (P.W.8), Mahendra Sah (P.W.5), Vinod Sah, Santosh Sah and Shravan Sah (P.W.2). The deceased was then taken to hospital at Raxaul from where he was referred to PMCH, Patna, where he died after 6 days. He has also stated that the incident took place on account of quarrel having taken place among the children earlier. In cross-examination, P.W.1 has stated that Suresh Sah (P.W.6) had filed the case against 9 accused persons and Shravan Sah (P.W.2) had filed case earlier against 13 accused persons. P.W.1 has also stated that prior to the said incident, there was no dispute in between the deceased and the accused persons. In his cross-examination, P.W.1 has stated that his statement was recorded by the police wherein he had stated that Mahanth Sah and Ramekbal Sah had ordered to kill the deceased. He has also stated that he had not stated before the police that at the time of occurrence, he was going towards the river for easing himself and in his front Shiv Nath Sah was going. He has also stated that when he reached the place of occurrence, 20 persons were there and Shiv Nath Sah was standing and when he saw Shiv Nath he did not find any injury



on his body and then in his presence, the accused persons had assaulted the deceased by *lathi*, whereafter he had fallen down, whereupon the accused persons had assaulted Shiv Nath repeatedly by *lathi* for 2-4 minutes. He has also stated that wherever *lathi* blow was inflicted on the deceased, scar (*daag*) had formed. He has also stated that two *lathi* blows were inflicted on the head of the deceased, whereafter swelling was visible and blood had spread over the injury, however the same was not flowing down. There was sign of *lathi* blow on the nose, however P.W.1 has stated that he did not get time to see as to where all injuries had been inflicted on the deceased. He has also stated that the deceased had not received injury by falling on brick but he had become unconscious on account of being assaulted on his head. P.W.1 has next stated that he does not remember to have have stated in this statement made in Sessions Trial No. 936 of 2007 that when he was standing at the place of occurrence, 8-10 people were also there and Shiv Nath Sah had fallen down on the southern side of the road. He has also stated that Manoj, Mahendar Sah (P.W.5) and others had lifted and taken Shiv Nath Sah to hospital. P.W.1 has next stated that Ram Darshan (P.W.4) was also assaulted by the accused persons and at the time he was assaulted, Shiv Nath was standing and he had



seen sign of one *lathi* blow on the hand of Ram Darshan, however, he cannot say as to how many people had come to save Ram Darshan. P.W.1 has also stated in his cross-examination that when Shiv Nath had gone for treatment, Ram Darshan (P.W.4) had also gone along with him for getting himself treated and he was treated at Adapur, however, P.W.1 has stated that he had not gone to Adapur. He has also stated that when the present case was filed by Suresh, he cannot say.

10. P.W.2 Shravan Sah is the brother of the deceased, who has stated that the occurrence dates back to three years at about 7:00 am in the morning, when he was going for easing himself and when he had reached at the door of the house of Ram Darshan Sah then he saw that Shiv Nath Sah had been surrounded by Mahanth Sah, Ajay Sah, Vijay Sah, Ramekbal Sah, Ram Sevak Sah (Appellant No. 1), Laxman Sah, Sri Lal Sah (Appellant No. 6), Madan Sah (Appellant No. 5), Panna Lal Sah, Inar Sah, Sanjay Sah (Appellant No. 2), Jawahir Bhagat, Ashok Sah (Appellant No. 4) and Awadhesh Sah (Appellant No. 3), totaling 17 in all. Laxman Sah had assaulted Shiv Nath Sah by *lathi*, whereafter he had fallen down and then all the accused persons started assaulting him by *lathi*. When Ram Darshan Sah (P.W.4) had arrived there, Awadhesh Sah (Appellant No. 3) had also



assaulted him by *lathi*. He has also reiterated the version of the prosecution. In cross-examination, he has stated that deceased is his real brother and he had filed a case at Patna. He has also stated that the present case was filed by Suresh Prasad against nine persons, however he had filed case at Patna against 17 persons. In his cross-examination, P.W.2 has also stated that his statement was recorded by Patna Police, however police of Harpur Thana had not taken his statement. P.W.2 has further stated that after the incident, he had gone to the market at around 10:00 am. P.W.2 has also stated that in his previous deposition, he has not stated that he had reached his house on the next day of the incident in the evening as also he had not stated that on the day on which Suresh had filed the case, he had gone out. He has also stated that though Shiv Nath was alive, but he did not get a chance to talk to him and after Shiv Nath had gone to Patna, he had gone there after 3 days. In paragraph No. 8 of his cross-examination, P.W.2 has stated that the persons whose houses are situated near the place of incident are not witness in the present case. He has also stated that when he reached at the place of occurrence, there were less than 100 persons present there including Mahendra Sah (P.W.5), Haridyal Sah (P.W.8), Hira Lal Sah whom he knows. He has further



stated in his cross-examination that after he reached at the place of occurrence, Shiv Nath Sah was lifted, however who had lifted him, he cannot say. He has also stated that Marshal vehicle had come after two hours of the occurrence and during the said period, treatment of Shiv Nath was being done by Dr. Dilip Kumar, where they had first taken the deceased, however bandage was not applied to the wounds of Shiv Nath Sah. He has also stated that Shiv Nath was not taken to the police station before being taken to Raxaul and he cannot say as to whether information was given at the police station or not.

11. P.W.3 Kisnawati Devi is the wife of the deceased, who has stated in her deposition that her husband was killed in the incident, which dates back to three and a half years at about 6.00 am in the morning when she was going along with her husband to Gawas Ghar (male sitting place) and when they had reached near the sitting place of the house of Ram Darshan Sah (P.W.4), she saw that in the house of Mahavir, all the accused persons were present including Mahanth Sah, Vijay Sah, Ajay Sah, Ramekbal Sah, Ram Sevak Sah (Appellant No. 1), Sri Lal Sah (Appellant No. 6), Om Prakash, Laghu Mahto, Madan (Appellant No. 5), Mahavir, Ambika Sah, Jawahir Bhagat, Ashok (Appellant No. 4), Awadhesh (Appellant No. 3), Panna



Lal Sah, Inar Sah and Sanjay Sah (Appellant No. 2), totaling 17 in all. Thereafter, Mahanth Sah had ordered to kill the deceased, whereafter Laxman had assaulted her husband by *lathi* and then all the other accused persons had also assaulted her husband by *lathi* and *fatta*, whereafter she had raised alarm and then Suresh (P.W.6), Shravan (P.W.2), Baijnath (P.W.1), Hiralal, Santosh and others had arrived, whereafter her husband was taken to Duncan Hospital for treatment from where he was referred to PMCH, Patna and after 6-7 days, he had died during the course of treatment. She had recognized the accused standing in the dock. P.W.3 has further stated that case was filed by her brother-in-law, namely Suresh Prasad (P.W.6). She has also stated that Shravan (P.W.2) is also her brother-in-law and while Suresh (P.W.6) had filed a case pertaining to murder of her husband at Harpur Police Station, Shravan Sah (P.W.2) had filed a case for the said incident at Pirbahore Police Station at Patna. She has stated that she does not know as to how many accused are named in the case filed at Patna. She has also stated that police had recorded her statement after one day of the death of her husband. P.W.3 has next stated that the place of incident is at a distance of one kilometer from her house and she cannot state the name of the neighbours. P.W.3 has further stated in her



cross-examination that at the time of occurrence, 26 people were present there and when she had seen her husband at the time of the incident he had fallen in the middle of the road, however, she cannot say how many injuries were inflicted on the body of her husband. P.W.3 has also stated in her cross-examination that her husband had not disclosed to her as to how many injuries were sustained by him on his body and who had assaulted him. She has also stated that she had not found any injury (*tuta futa*) on the body of the deceased. She has stated that after she started crying, other people had arrived there including Ram Darshan Sah (P.W.4), Suresh Sah (P.W.6), Baijnath Sah (P.W.1) and Santosh but she cannot say as to after how much time they had arrived. In paragraph No. 5 of her cross-examination, P.W.3 has stated that when she reached near her husband he had fallen down and had become unconscious.

12. P.W.4 Ram Darshan Sah is an independent witness, who has stated in his deposition that the incident in question dates back to three years at about 6:00 am in the morning when he was at his house and after hearing alarm (*hulla*), he went outside and saw that 16-17 persons had surrounded Shiv Nath and were abusing him. The accused persons were Mahanth Sah, Inar Sah, Sanjay Sah (Appellant No. 2), Jawahir Sah, Ashok Sah



(Appellant No. 4), Vijay Sah, Laxman Sah, Madan Sah (Appellant No. 5), Ambika Sah, Mahavir Yadav, Srilal Sah (Appellant No. 6), Om Prakash Sah, Ramekbal Sah and Ram Sevak Sah (Appellant No. 1). The accused persons were armed with *lathi* in their hands and Awadhesh (Appellant No. 3) had exhorted the other accused persons to assault Shiv Nath Sah, whereafter Laxman Sah had given *lathi* blow on the head of Shiv Nath Sah, whereafter Shiv Nath Sah had fallen down and then Awadhesh Sah (Appellant No. 3) had hit on the right hand of P.W.4, leading to his hand being plastered in the hospital. Shiv Nath was taken to Duncan hospital from where he was taken to Patna and he died after 4-5 days of treatment. He has also stated that apart from him, Mahendra Sah (P.W.5), Haridyal Sah (P.W.8), Ram Ekbal Sah and others had witnessed the incident. He had recognized the accused persons standing in the dock. In cross-examination, PW4 has stated that he is an accused in the counter case and there was no dispute from before. He has also stated that he had not filed any case after his hand was fractured, however case was filed on the date of incident. He has also stated that police personnel had also examined his injury. P.W.4 has next stated that 15-16 people are accused and the case was filed by Suresh (P.W.6) and he had not



gone with Shiv Nath to get him treated. P.W.4 has further stated in his cross-examination that after hearing alarm, he had come out of his house after 10 minutes, where 17-18 persons were present and Shiv Nath had fallen down on the road on the southern side and at that time he was conscious, however he did not talk with Shiv Nath and after 10 minutes of him reaching at the place of occurrence, Shiv Nath became unconscious. P.W.4 has further stated in cross-examination that blood had not oozed out of his wound and his hand was plastered two months back, but he cannot state the name of the Doctor who had plastered his hand as also he does not recall as to who had treated him.

13. P.W.5 Mahendra Sah is also an independent witness, who has stated in his deposition that the incident dates back to five years at about 6:00 am in the morning when he was sitting at his house and was basking himself in the heat of fire when he heard *hulla* (alarm) and then he went to the door of the house of Ram Darsan (P.W.4) where many people armed with *lathi* and *fatta* were present like Mahanth Sah, Ajay Sah, Vijay Sah, Panna Lal Sah, Sanjay Sah (Appellant No. 2), Jawahir Sah, Awadhesh Sah (Appellant No. 3), Ashok Sah (Appellant No. 4), Ram Sevak Sah (Appellant No. 1), Madan Sah (Appellant No. 5), Ramekbal Sah, Laxman Sah, Sri Lal Sah (Appellant No. 6) and Mahavir



Yadav, totaling to 15-16 persons. P.W.5 has further stated that Laxman had given a blow on the head of Shiv Nath by *lathi* and Awadhesh (Appellant No. 3) had hit on the hand of Ram Darshan, resulting in fracture of his hand. P.W.5 has also stated that Shiv Nath was taken to Duncan Hospital from where he was referred to PMCH, Patna and he died at Patna during the course of treatment. P.W.5 has stated in his cross-examination that Police had not made inquiries from him. In paragraph No. 16 of his cross-examination, P.W.5 has stated that when he reached at the place of occurrence, Shiv Nath had become unconscious and 30-40 persons including Ram Darshan (P.W.4) were watching the incident and then P.W.4 was also assaulted and his wrist had broken. P.W.5 has also stated in his cross-examination that he was also watching the incident and had stayed at the place of occurrence for 10 minutes, however when he reached there, both the injured persons had fallen down on the road.

14. P.W.6 Suresh Prasad is the informant of the present case and is also brother of the deceased who has stated in his deposition that the incident dates back to about five years at about 6:30 am in the morning when he was sitting at the door of his house and upon hearing the *hulla* (alarm), he had gone to the



door of the house of Ram Darshan (P.W.4), where he saw that Shiv Nath had been surrounded by the accused persons namely, Mahanth, Ajay, Vijay, Panna Lal, Inar Sah, Sanjay Sah (Appellant No. 2), Jawahir Sah, Awadhesh Sah (Appellant No. 3), Ashok (Appellant No. 4), Laxman Sah, Sri Lal Sah (Appellant No. 6), Om Prakash Sah, Ambika Sah, Madan Sah (Appellant No. 5), Ramekbal Sah and Ram Sevak Sah (Appellant No. 1), totaling 17 in all. These persons were holding *lathi* in their hands and were also abusing, whereupon Awadhesh Sah (Appellant No. 3) and Mahanth Sah had exhorted the accused persons to kill Shiv Nath, whereafter Laxman Sah had given three *lathi* blows on the head of Shiv Nath, leading to him falling down and then Ram Darshan Sah (P.W.4) had come to save him but he was assaulted on his hand by *lathi* by Awadhesh, however, co-villagers had then arrived resulting in the accused persons fleeing away. P.W.6 has also stated that he had given written report of the incident and upon him having told about the incident to Megnath Prasad, he had scribed the written report, which was then read over to him and then he had put his signature over the same, which has already been exhibited earlier. In cross-examination, P.W.6 has stated that though he had disclosed name of 17 accused persons, but the



person writing the same had not written all the names. He has also stated that case has been filed against 9 accused persons and his brother Shravan (P.W.2) had also filed a case against 7 persons. P.W.6 has further stated that in his written report, he had named 17 accused persons, however name of none of the accused was deleted. It is next stated that the written report was written in the village, whereafter the same was given to the Officer-in-Charge of the Police Station and before giving the written report, the Police had arrived at the place of occurrence for making inquiry. P.W.6 has also stated that the Police had come in the village at around 10-11 hours and had stayed at the village for 1½ - 2 hours, however, during the said period no witness had given any statement. P.W.6 has further stated that when the Police had arrived in the village, the deceased was not present in the village, however he has again stated that one hour after arrival of the Police, his brother was taken for treatment. The Police Officer had examined the injuries on the body of the deceased and had sent him for treatment. In paragraph No. 18 of his cross-examination, P.W.6 has stated that he had given written report to the Police Station at 2:00-3:00 hours. He has also stated that he had got the written report scribed by Megnath Prasad, whereafter the same was read over to him and then he



had made his signature over the same. P.W.6 has also stated that when the statement of Shravan (P.W.2) was recorded at Patna, he was not present there. He has also stated that after filing the case he did not come to know as to against how many accused persons the case has been lodged, however, he has stated that the case is going on against 17 accused persons. P.W.6 has further stated that Ram Darshan (P.W.4) is his cousin brother. P.W.6 has next stated in his cross-examination that when he saw Shiv Nath, he was standing and upon him seeing Shiv Nath at the inception, he did not find any sign of injury on the body of Shiv Nath and he had stayed at the place of occurrence for 5 minutes, during which period his brother had fallen down, whereafter he was lifted and taken to hospital. In paragraph No. 31 of his cross-examination, P.W.6 has stated that the deceased had fallen on the road and he had seen sign of injuries on his body as also swelling had erupted at various places on the body of the deceased and all the injuries were inflicted by *lathi*. In paragraph No. 36 of his cross-examination, P.W.6 has stated that blood had not dropped at the place of occurrence. In paragraph No. 37 of his cross-examination, P.W.6 has stated that he had filed the case after coming back from the Hospital, where the Police had not reached and his brother had stayed at Raxaul



hospital for one and a half hours, where treatment was carried out and then he was referred to PMCH, Patna.

15. P.W.7 Ganesh Ram is the Investigating Officer of the present case and he has stated in his deposition that on 24.01.2007, he was posted as Officer-in-Charge, Harpur Police Station and in the night at about 9:00 pm he had received written report of Suresh Prasad, which was forwarded to the Officer-in-Charge, Adapur Police Station for registration of formal F.I.R., which was registered under Sections 147, 148, 149, 341, 323, 325, 307, 379 and 504 of the IPC and then he had assumed the investigation of the case. P.W.7 has also stated that he had recorded the re-statement of the informant at 11:15 hours and had then proceeded to the place of occurrence, where he had recorded the statement of the injured, namely Ram Darshan Sah (P.W.4) as also had issued requisition for medical examination of Ram Darshan Sah. P.W.7 has also referred to the place of occurrence and described the same. P.W.7 has stated that he had recorded the statement of various witnesses, namely, Baijnath Prasad (P.W.1), Ramekbal Sah, Santosh Sah, Ramji Sah and Vinod Sah on the same day. On 26.01.2007, he had recorded the statement of wife of the injured Shiv Nath Sah, namely Kisnawati Devi (P.W.3), Baban Prasad, Hiralal Sah and Haridyal



Sah (P.W.8). On 31.01.2007, during the course of investigation, P.W.7 received information that the injured Shiv Nath Sah had died at PMCH, Patna on 30.01.2007, whereafter he had filed a petition for adding section 302 of the IPC on 05.02.2007. On 12.02.2007, postmortem report of the deceased, Shiv Nath Sah was received by him and on 13.02.2007, he had received the *fardbayan* of Shravan Sah (P.W.2), which was recorded at PMCH, Patna, by Sub-Inspector of Police, B.N. Singh. P.W.7 has further stated that he had filed charge-sheet against the accused persons under Sections 147, 148, 149, 341, 323, 325 and 302 of the IPC. P.W.7 has also stated that he has also filed another charge-sheet against the accused persons under the same Section. In cross-examination, P.W.7 has stated that counter case bearing Case No.14 of 2007 had also been filed and he had not conducted the investigation of the said case however, charge-sheet was submitted in the said case. P.W.7 has next stated that written report is the basis of F.I.R. lodged pertaining to Adapur P.S. Case No.15 of 2007, wherein nine persons have been arrayed as accused and after recording of the *fardbayan* of Shravan Sah, the number of accused person had increased. P.W.7 has also stated that he had filed final form qua the accused namely Awadhesh Sah (Appellant No. 3) and Sanjay Sah



(Appellant No. 2). P.W.7 has next stated that Madan Sah (Appellant No. 5), Ashok Sah (Appellant No. 4) and Sri Lal Sah (Appellant No. 6) are non F.I.R. named accused persons. P.W.7 has further stated in his cross-examination that he had received information about the incident at 9:00 pm in the night on 24.01.2007 and the incident had taken place at 6:30 am in the morning of 24.01.2007. In paragraph No. 14 of his cross-examination, P.W.7 has stated that he had recorded the statement of Ram Darshan (P.W.4) at the place of occurrence at 11:15 hours in the night. He has also stated that he had not recorded the statement of Kisun Sah and had also not recorded the statement of the deceased till the deceased was alive nor he had tried to meet him. PW-7 has further stated in his cross-examination that witnesses, namely Baijnath Prasad (P.W.1), Ram Ekbal Sah, Santosh Sah, Ramji Sah and Binod Sah had told him about other accused person having assaulted the deceased by *lathi*. He has further stated that witness Baijnath Prasad (P.W.1) has stated before him that Laxman had given two *lathi* blows on the head of the deceased. He has also stated that Ram Ekbal Sah has stated before him that Mahanth Sah had assaulted the deceased with *lathi* with the intention to kill him, however, it had hit the deceased over his nose, whereafter



Laxman had assaulted the deceased on his head by *lathi*. P.W.7 has also stated that witness Ramji Sah had stated before him that Laxman Sah, Shrilal Sah, Madan Sah, Ram Ekbal Sah, Mahanth Sah, Ajay Sah, Vijay Sah, Sanjay Sah, Inar Sah and Ram Sevak Sah had fled away before he had arrived at the place of occurrence.

16. P.W.8 Harilal Sah has stated in his deposition that he does not know anything about the incident, hence he was declared hostile. He has also stated in his cross-examination that at the time of occurrence, he was not in the village and had gone outside to earn his livelihood.

17. PW.9 Dr. Arun Kumar Singh is the Doctor, who had conducted the postmortem of the dead body of the deceased, namely, Shiv Nath Sah and he has stated in his deposition that on 31.01.2007, he was posted as Tutor at Patna Medical College and on the same day, he had conducted the postmortem examination on the dead body of the deceased, Shiv Nath Sah at about 1:00 pm.

“External appearance

Average built rigor-mortis present all over. Foley’s Catheter present. Right eye blacken.

Following ante-mortem, external and internal injuries



were found on the dead body of the deceased:-

No. 1- One healed abrasion 1 ½” x ½” on front of nose. On dissection, there was hematoma under scalp in both frontal, both parietal and both temporal region on head. There was comminuted fracture of left frontal, left temporal, left parietal, right parietal and right temporal bones. There was separation of calomel suture also. There was extradural hematoma 4 ½” x 3 ½” on left frontal, left temporal, left parietal region of brain. Brain was congested. Heart contained little blood on right side, left empty. Stomach contained greenish fluid about 100 ml. All other viscera were found congested. Bladder empty.

Opinion

- (1). Time since death 06 to 24 hours from the time of postmortem examinations.*
- (2). Cause of death head injury.*
- (3). Nature of violence hard and blunt substance and its impact.”*

P.W.9 has further stated that the Postmortem report was written by him and bears his signature, which he has identified. PW-9 has proved the postmortem report, which has been written by him in his hand writing and he has identified his signature, which has been marked as Exhibit-1. In his cross-examination, PW-9 has stated that he had found one abrasion 1½” x ½” on front portion of the nose of the deceased, however, he had not



found any other external injury on the body of the deceased. He has also stated that if assault is made by *lathi* over the head, it is not necessary that external injury would be inflicted, however, sometimes it can also appear. He has also stated that in case of excessive hair on the head, external injury is not seen after resolution of hematoma. He has next stated that it can take up to one month for hematoma to resolve. P.W.9 has also stated that hematoma can also be formed upon falling on a hard substance.

18. P.W.10 Dr. S. K. Paswan is the Doctor, who had examined the injured witnesses Ram Darshan Sah (P.W.4) and he has stated in his deposition that on 25.01.2007, he was posted at Primary Health Centre, Adapur and on that day at 1:45 pm, he had examined Ram Darshan Sah and had found the following injuries:-

“(1). Swelling 3” x 2” near lower end of lower ulna.

X-Ray A.P. & lateral view shows evidence of lower end of ulna bone.

(2). Age of injuries- within 24 hours.

(3). Nature of injuries- Grievous in nature, hard and blunt substance.”

P.W.10 has identified the injury report, which he has stated is in his writing as also he has identified his signature made over the same and the same has been marked as Exhibit No. 2. In his cross-examination, P.W.10 has stated that he had not taken the thumb impression or signature of the deceased on



the injury report. P.W.10 has also stated that falling on the hand may also lead to such injuries. P.W.10 has next stated that in his injury report, there is no reference to X-Ray plate since X-ray technician does not give any report and the said X-Ray is not present before him today.

19. P.W.11 Anil Kumar is an advocate clerk, who has proved the FIR of Adapur P.S. Case No.15 of 2007 and has stated that the written report, leading to registration of formal F.I.R., has already been exhibited as Exhibit-1 in the original case and the inquest report has been exhibited as Exhibit-2 in the original case. He has also identified the certified copy of the same, which has already been exhibited in the original case.

20. After closing the prosecution evidence, the learned Trial Court recorded the statement of the appellants on 24.07.2015 under Section 313 of the Cr.P.C. for enabling them to personally explain the circumstances appearing in the evidence against them, however they claimed themselves to be innocent, nonetheless, in reply to a question being put to them as to what they have to say in their defense, they answered that they have to say nothing. The defense had then examined four defense witnesses, which is being cursorily discussed hereinafter.

21. D.W.1 Nagendar Kishore Verma is a compounder, who



has stated that on 22.01.2007, he was the compounder of Dr. Shyam Lal Das, Orthopedician and the said Doctor had died in the year 2008. He has further stated that on 22.01.2007, Doctor had examined Awadhesh Sah, who had pain in his back and he has proved the prescription, which is stated to be in the writing of the Doctor and the same has been marked as Exhibit-A.

22. D.W.2 Madhusudan Yadav is a shopkeeper at Nepal, who has stated in his deposition that he is carrying on business in Nepal, since 20 years and in the month of January 2007, Sanjay Sah (Appellant No. 2), Prakash Parit and Mukesh Mandal were working as staff at his shop, his shop opens daily at 6:00 am in the morning and remains open till 10:00 pm in the night and the said staff used to stay there and eat there. He has also stated that Sanjay Sah (Appellant No. 2) was working at his shop in the year 2002 and in the month of January 2007, Sanjay Sah (Appellant No. 2) was at his shop and had not gone to his house. He has also stated that afterwards, he came to know that in the village of Sanjay Sah, murder has taken place and he has been implicated in the said case. In his cross-examination, D.W.2 has stated that Sanjay Sah (Appellant No. 2) is not his co-villager and though he maintains register of his employee, but he has not brought the same to the Court.



23. D.W.2 (should be D.W.3) Om Prakash Parit @ Jay Prakash Parit has stated in his deposition that in the year 2007, he was working in the shop of Madhusudhan Yadav, situated at Putli Bazaar, Narayan Ghat (Nepal), during the period of Saraswati Puja. He has also stated that Mukesh Mandal and Sanjay Sah (Appellant No. 2) also used to work with him, they used to stay with him and Sanjay (Appellant No. 2) had not gone to his house either in the month of January–February or during the period of six months before and after the said months. He has stated in his cross-examination that Sanjay Sah (Appellant No. 2) is not his co-villager and he cannot say that Sanjay Sah used to go home.

24. D.W.3 (should be D.W.4) Mukesh Mandal has stated in his deposition that he was working in the shop of Madhusudhan Yadav in the year 2004, which was in the name and style of Vaishnav Traders and along with him Sanjay Sah (Appellant No. 2), Mukesh Mandal and Om Prakash Pandit were also working at the said shop. In the month of January 2007, during the festival of Saraswati Puja, Sanjay Sah (Appellant No. 2) was present at Narayan Ghat and he had gone to his house six months before Saraswati Puja. In his cross-examination, he has stated that he does not have any documentary proof to the effect



that he was working at Narayan Ghat in the year 2004 and he cannot say as to who was working prior to 2004 at the shop in question.

25. The trial Court, upon appreciation, analysis and scrutiny of the evidence adduced at the trial, has found the aforesaid appellants guilty of the offence and has sentenced them to imprisonment and fine, as noted above, by its impugned judgment and order.

26. A bare perusal of the evidence of the prosecution reveals that on 24.1.2007 at 6:30 am in the morning, the elder brother of Suresh Prasad (the informant), namely, Shiv Nath Prasad (deceased), was coming after easing himself and when he had reached at the door of the house of Ram Darshan Sah (P.W.4), the appellants No. 1 to 3 and other accused persons had surrounded him, who were sitting there from before, whereafter Laxman Sah (Co-convict in Sessions Trial No. 403/2009) had given *lathi* blows on the forehead of the deceased Shiv Nath Prasad resulting in him sustaining injuries and falling down on the ground, whereafter the other accused persons had also assaulted the deceased Shiv Nath Prasad with *lathi* and *fatta* leading to the deceased Shiv Nath Prasad becoming unconscious, whereafter Ram Darshan Sah (P.W. 4) had



intervened to save the deceased, however, the accused person, namely, Awadhesh Sah (Appellant No. 3) had given a *lathi* blow on his right hand leading to his right hand being fractured. In fact, other family members and co-villagers had also arrived at the place of incident and had watched the occurrence. The deceased Shiv Nath Prasad was taken to Duncan Hospital at Raxaul, but he was referred to PMCH, Patna, where he died during the course of treatment after 5-6 days of the incident. At this juncture, it would be relevant to mention that P.W.1 Baijnath Prasad, P.W. 2 Shravan Sah, P.W.3 Kisnawati Devi, P.W. 4 Ram Darshan Sah, P.W. 5 Mahendra Sah and P.W. 6 Suresh Prasad are the eye-witnesses to the aforesaid occurrence and they have deposed consistently with regard to the over tact engaged in by the appellants herein and others, which has also stood the test of cross-examination. It is a well-settled law that minor discrepancies, if any, in the prosecution's evidence being insignificant in nature, cannot have any effect on the case of the prosecution in case of overwhelming incriminating evidences adduced at the trial to establish the guilt of the appellants.

27. The prosecution's narrative in the FIR is fully supported by the ocular evidence adduced at the trial and the ocular evidence is corroborated by the medical evidence, inasmuch as



the Doctor has categorically stated in his evidence that the cause of death is head injury caused by hard and blunt substance.

28. In fact, the appellants have not been able to show any material contradiction in the statement of the witnesses, inasmuch as though the statements made by the witnesses under Section 161 Cr.P.C. were put to P.W.7 Ganesh Ram (Investigating Officer) to elicit his response, however, a bare perusal of the evidence of P.W.7 would show that as far as P.W. 1 is concerned, no contradiction could be extracted, inasmuch as P.W.7 has stated in his evidence that P.W.1 had told him that Laxman Sah had inflicted 2 *lathi* blows on the head of the deceased and other accused persons had also assaulted him by *lathi* and *fatta*. However, statements of other prosecution witnesses, made under Section 161 Cr.P.C., were not put to P.W. 7 (Investigating Officer) to elicit his response. Thus, considering the ocular evidence of the prosecution witnesses, which has stood the test of cross-examination, in our opinion, minor discrepancies in their evidence cannot affect the prosecution case, hence, the prosecution witnesses do not appear to be untrustworthy.

29. Now coming to the submissions made by the learned Senior Counsel for the appellants, we find that he has argued



vehemently that the written report dated 24.1.2007, submitted by the informant leading to lodging of the FIR on 25.1.2007 is not the earliest version since firstly, the same is not in his writing and secondly, the scribe of the said written report, namely Meghnath Prasad has not been examined by the prosecution, apart from the fact that the written report dated 24.1.2007 does not even contain any recital to the effect that the FIR was read over to the informant, who had understood the same and had then put his signature after finding the same to be correct. We find that unnecessary efforts have been made to create a lacuna, but the fact remains that the informant, namely Suresh Prasad (P.W.6), has stated in his evidence that the written report was though scribed by Meghnath Prasad, but the same was read over to him and then after understanding the same, he had put his signature over the same, which has duly been identified. Another aspect of the matter is that no question has been put to the witness, especially to the informant i.e. P.W.6 in cross-examination regarding untruthfulness of the written report and that the same is fabricated, hence the unchallenged part of the evidence of a witness has to be relied upon. It is a well-settled law that in absence of question being put to the witness in cross-examination to a particular fact and circumstance, the



unchallenged part of the evidence of such a witness is to be relied upon. Reference, in this connection, be had to a judgment, rendered by the Hon'ble Apex Court in the case of ***Gian Chand & Others vs. State of Haryana***, reported in (2013) 14 SCC 420, as also to a judgment rendered by the Hon'ble Apex Court in the case of ***Laxmibai vs. Bhagwantbuva***, reported in (2013) 4 SCC 97, paragraph no. 40 whereof is reproduced herein below:-

“40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the



circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

30. We also find that as far as lodging of FIR on the basis of written report dated 24.1.2007 is concerned, there is no lacuna, inasmuch as after the police had received the written report dated 24.1.2007 at 9:00 pm, the same was forwarded to the Officer-in-Charge, Harpur (Adapur) Police Station, whereupon the FIR was immediately registered on 25.1.2007 at 12:30 hours and then, the same was sent to the Court on 27.1.2007. Thus, we find that the argument advanced by the learned Senior Counsel for the appellants that the earliest version of the incident in question has been withheld merits no consideration.

31. The learned Senior Counsel for the appellants has next tried to impeach the credibility of the prosecution witnesses and has submitted that they are actually not eye-witnesses, inasmuch as they had arrived at the place of occurrence much after the occurrence had taken place. It has been submitted that as far as P.W. 3 Kisnawati Devi is concerned, she has stated in her evidence that after she raised *hulla*, Suresh (P.W.6), Shravan



(P.W.2), Baijnath (P.W.1), Santosh, etc. had arrived there. It has also been submitted that P.W.3 has stated in her evidence that when she had reached the place of occurrence, her husband was conscious but he did not tell her as to who had assaulted him, meaning thereby that she was also not present at the time her husband was being assaulted. It is also submitted that most of the witnesses have been examined by the police after lapse of considerable time of the occurrence and moreover, the prosecution story does not corroborate with the medical evidence. It is also submitted that the motive of the occurrence has not been proved, thus, in nutshell, the case of the appellants is that the evidence of the prosecution witness would show that none of them are eye-witnesses, hence, their evidence cannot be said to be credible or trustworthy, thus, the conviction of the appellants is fit to be set aside. We find from a bare perusal of the evidence of the prosecution evidences that minor discrepancies in their evidence cannot affect the prosecution case as we have already come to a conclusion that the prosecution witnesses do not appear to be untrustworthy. As far as P.W. 3 is concerned, she has stated in her evidence that while she was going along with her husband to Gawas Ghar and when they had reached near the sitting place of the house of Ram



Darshan Sah (P.W.4), she had seen the appellants whereafter, Laxman Sah and other accused persons including the appellants had assaulted her deceased husband, which has also stood the test of cross-examination, thus, minor contradiction would not impact the case of the prosecution. As far as P.W. 6 i.e. the informant, Suresh Prasad, is concerned, he has also stated in his evidence that he had witnessed the incident and had seen the appellants assaulting the deceased Shiv Nath, which has also stood the test of cross-examination. As regards P.W.2 Shravan Sah, we find that he has consistently stated in his evidence that after he was coming back upon easing himself and had reached the house of P.W. 4, the appellants and others had caught hold of the deceased Shiv Nath and then Laxman Sah had hit on the head of the deceased, whereafter the other accused persons including the Appellants had assaulted the deceased. Thus, we find that the appellants have failed to show that P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.6 are not eye-witnesses to the incident in question. In fact, all the prosecution witnesses have deposed consistently and there is no material contradiction in their evidence, apart from the fact that they have also stated in their evidence to be eye-witness to the alleged occurrence, hence, we find that the evidence of prosecution witnesses are



credible and trustworthy being consistent and cogent, thus fit to be relied upon to establish the guilt of the appellants. It is a well-settled law that in case, direct evidence is available, motive does not play much role. We also find that the witnesses have consistently deposed that the accused Awadesh Sah had assaulted P.W. 2 Ram Darshan Sah on his right hand leading to his right hand being fractured. We further find that the ocular evidence is fully supported by the medical evidence.

32. Yet another aspect of the matter, which has been canvassed by the learned Senior Counsel for the appellants, is that though there is one external injury on the body of the deceased, but 12 accused persons have been convicted and even Laxman Sah had not engaged in repeated blow, hence he had no intention to kill the deceased, thus the present case would fall within the ambit of culpable homicide not amounting to murder. In this regard, we find upon going through the evidence of P.W. 8 Dr. Arun Kumar Singh, who had conducted the postmortem examination of the dead body of the deceased Shiv Nath Sah that though externally one healed abrasion 1 ½” x ½” was found on front of nose, however on dissection, there was hematoma under scalp in both frontal, both parietal and both temporal region on head. There was comminuted fracture of left frontal,



left temporal, left parietal, right parietal and right temporal bones. There was extradural hematoma 4 ½” x 3 ½” on left frontal, left temporal, left parietal region of brain and brain was congested. Thus several grievous injuries were found on dissection.

In fact, P.W.8 has opined that the cause of death is head injury caused by hard and blunt substance. We also find that the prosecution witnesses have consistently deposed that 2-3 *lathi* blows were inflicted by Laxman Sah resulting in the deceased sustaining injuries and falling down on the ground, whereafter all the appellants and other accused persons had assaulted the deceased by *lathi* and *fatta*. Thus, we find that on account of Laxman Sah having repeatedly assaulted the deceased by *lathi* on his forehead resulting in hematoma and fracture at several places on the head / skull, as is apparent from the postmortem report, the deceased Shiv Nath Prasad died, hence the deceased was not only assaulted brutally by Laxman Sah but also by others including the appellants. Nonetheless, we find that it is a settled law that in cases where a large number of accused persons constituting an unlawful assembly are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at



all and by invoking Section 149, the members of an unlawful assembly can be punished on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries. Reference, in this connection, be had to a judgment, rendered by the Hon'ble Apex Court in the case of *Nitya Nand vs. State of Uttar Pradesh & Anr.*, reported in (2024) 9 SCC 314, paragraphs no. 41 to 48 are reproduced herein below:-

“41. Section 141 IPC defines “unlawful assembly”. It says an assembly of five or more persons is designated as unlawful assembly if the common object of the persons composing that assembly is to commit an illegal act by means of criminal force.

42. As per Section 148 IPC which deals with rioting armed with deadly weapon, whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. “Rioting” is defined in Section 146IPC. As per the said definition, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

43. This brings us to the pivotal section which is Section 149IPC. Section 149 IPC says that every member



of an unlawful assembly shall be guilty of the offence committed in prosecution of the common object. Section 149 IPC is quite categorical. It says that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the said assembly; is guilty of that offence. Thus, if it is a case of murder under Section 302IPC, each member of the unlawful assembly would be guilty of committing the offence under Section 302 IPC.

44. In Krishnappa v. State of Karnataka [Krishnappa v. State of Karnataka, (2012) 11 SCC 237 : (2013) 1 SCC (Cri) 621] , this Court while examining Section 149IPC held as follows : (SCC p. 243, paras 20-21)

“20. It is now well-settled law that the provisions of Section 149IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any



other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly knew that offence is likely to be committed in prosecution of that object.

21. The factum of causing injury or not causing injury would not be relevant, where the accused is sought to be roped in with the aid of Section 149IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not.”

45. Thus, this Court in Krishnappa case [Krishnappa v. State of Karnataka, (2012) 11 SCC 237 : (2013) 1 SCC (Cri) 621] held that Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. By application of this principle, every member of an unlawful assembly is roped in to be held guilty of the offence committed by any member of that assembly in prosecution of the common object of that assembly. The factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of Section 149 IPC. The question which is relevant and which is required to be answered by the court is whether the accused was a member of an



unlawful assembly and not whether he actually took part in the crime or not.

46. *As a matter of fact, this Court in Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel [Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel, (2018) 7 SCC 743] has reiterated the position that Section 149IPC does not create a separate offence but only declares vicarious liability of all members of the unlawful assembly for acts done in common object. This Court has held :*

“20. In cases where a large number of accused constituting an “unlawful assembly” are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on record justifies. The mere presence of an accused in such an “unlawful assembly” is sufficient to render him vicariously liable under Section 149IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149IPC for the offence punishable under Section 302IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get



away with the crime.

22. When a large number of people gather together (assemble) and commit an offence, it is possible that only some of the members of the assembly commit the crucial act which renders the transaction an offence and the remaining members do not take part in that “crucial act” — for example in a case of murder, the infliction of the fatal injury. It is in those situations, the legislature thought it fit as a matter of legislative policy to press into service the concept of vicarious liability for the crime. [Ramu Gope v. State of Bihar, 1968 SCC OnLine SC 74, para 5 : AIR 1969 SC 689, p. 692, para 5: “5. ... When a concerted attack is made on the victim by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence.”] Section 149IPC is one such provision. It is a provision conceived in the larger public interest to maintain the tranquillity of the society and prevent wrongdoers (who actively collaborate or assist the commission of offences) claiming impunity on the ground that their activity as members of the



unlawful assembly is limited.

34. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.”

47. It is true that there are certain lacunae in the prosecution. The scribe Kuldeep was not examined. Similarly, the younger brother Laxmi Narain was not examined though it has come on record that Laxmi Narain was killed in the year 1993 and in that case one of the accused is the appellant himself. It is also true that neither any country-made pistol was recovered nor any cartridge, empty or otherwise, recovered. However, the appellant has been roped in with the aid of Section 149IPC. Therefore, as held by this Court in Yunis v. State of M.P. [Yunis v. State of M.P., (2003) 1 SCC 425 : 2003 SCC (Cri) 341] , no overt act is required to be imputed to a particular person when the charge is under Section 149IPC; the presence of the accused as part of the



unlawful assembly is sufficient for conviction. It is clear from the evidence of PW 1 and PW 2 that the appellant was part of the unlawful assembly which committed the murder. Though they were extensively cross-examined, their testimony in this regard could not be shaken.

48. In view of what we have discussed above, we have no doubt in our mind that the trial court had rightly convicted the appellant under Section 148IPC read with Sections 302/149IPC and that the High Court was justified in confirming the same. The question framed in para 16 above is therefore answered in the affirmative.”

33. We thus find from the evidence of the prosecution witnesses that all the accused persons including the appellants herein were members of unlawful assembly and the offence in question was primarily committed by the co-convict Laxman Sah (convicted u/s. 147 & 302 IPC in Sessions Trial No. 936/2007) leading to death of Shiv Nath Prasad as also by the other accused persons including the Appellants, who are members of the unlawful assembly, in prosecution of the common object of that assembly, hence all the accused persons including the appellants, who were member of the said unlawful assembly at the time of commission of the offence in question, are definitely guilty of that offence i.e. the one u/s. 302 of the IPC by invocation of Section 149 of the IPC. Thus, even though the deceased has died primarily on account of fatal blow inflicted



by Laxman Sah, nonetheless the appellants and other accused persons are liable to be convicted under Section 302 of the IPC with the aid of Section 149 IPC, keeping in view the principle laid down by the Hon'ble Apex Court in the case of *Nitya Nand* (supra). Now coming to the conviction of the appellants under Section 147 IPC, this Court finds that rioting has been defined under Section 146 of the IPC, which reads as follows:-

“146. Rioting-Whenever force or violence is used by an unlawful assembly, by any members would be, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.”

Section 141 IPC defines unlawful assembly as an assembly of five or more persons, if the common object of the persons composing that assembly is to commit an illegal act by means of criminal force. Section 147 provides for punishment of rioting. This Court finds, considering the evidence led by the prosecution that the appellants have rightly been convicted under Section 147 IPC. We also find that the present case will not fall within the ambit of Section 304 Part-II of the IPC since Laxman Sah had given repeated *lathi* blows on the head of the deceased leading to his subsequent death and as far as the appellants are concerned, they being member of unlawful



assembly, have rightly been convicted under Section 302 of the IPC with the aid of Section 149 of the IPC.

34. Considering the facts and circumstances of the present case and the evidence, which has been brought on record to prove the allegations levelled against the appellants beyond pale of any reasonable doubt as well as considering the credibility and trustworthiness of the evidence of the prosecution, which has not been discredited during the course of cross-examination coupled with the postmortem report and for the reasons mentioned hereinabove, we find that there is no reason to create any doubt in our minds. We have examined the materials available on record and do not find any apparent error in the impugned judgment of conviction and order of sentence, hence, the same does not require any interference.

35. Accordingly, the present appeal i.e. Criminal Appeal (DB) No. 1136 of 2016 stands dismissed.

36. In view of the fact that the present appeal has stood dismissed, the bail bonds of the Appellants No. 1, 2 and 4 to 6, who were granted bail during the pendency of the present appeal by an order dated 21.12.2016, are hereby cancelled and they are directed to surrender before the learned Trial Court for being sent to jail for serving the remaining sentence. As far as the



Appellant No. 3, namely, Awadhesh Sah, is concerned, he is already in custody, hence, he is directed to serve the remaining sentence.

(Mohit Kumar Shah, J)

I agree.
Nani Tagia, J:

(Nani Tagia, J)

Ajay/-

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